

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

**WISCONSIN FEDERATION OF NURSES AND HEALTH
CARE PROFESSIONALS, AFT, AFL-CIO LOCAL 5001**

Case 616

No. 66932

MA-13690

(Shirley Williams Grievance)

Appearances:

Jeffrey P. Sweetland, Hawks, Quindel, Ehlke & Perry, S.C., 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, WI 53201-0442, appearing on behalf of Wisconsin Federation of Nurses & Health Care Professionals, AFT, AFL-CIO, Local 5001.

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Room 303, Milwaukee, WI 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

Milwaukee County, hereinafter County or Employer, and Wisconsin Federation of Nurses & Health Care Professionals, AFT, AFL-CIO, Local 5001, hereinafter Union or Federation, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on July 12, 2007 in Milwaukee, Wisconsin. A transcript of the hearing was filed on July 20, 2007. The parties filed written argument by August 29, 2007 and had previously waived the filing of reply briefs. The record was therefore closed on August 29, 2007.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties stipulated that the issue to be decided is:

Did the Employer have just cause to issue a one-day suspension to the Grievant, Ms. Williams, and if not, what is the remedy?

BACKGROUND and FACTS

The essential facts of this case are undisputed. The Grievant, Shirley Williams, is employed by the County as an RN II at Milwaukee County Behavioral Health. She works as the charge nurse on Unit 44C in Rehab Central. The unit is basically a geriatric unit, though there are an increasing number of younger patients being placed on the unit.

Gordon Engeldinger is the nursing program coordinator for the Behavioral Health Division. He serves in a management capacity and directs the activities of three long-term units, 44A, 44B and 44C. Historically, Mr. Engeldinger has sought to have monthly meetings of the RN IIs from the various units for the benefit of communicating pertinent clinical information dealing with global issues and concerns, and providing an opportunity for the RN IIs to bring forth any questions, concerns, or problems they were having which they wanted to share with their peers or with management. During 2005 and 2006, these meetings, usually held on the second Tuesday of each month, were not well attended, with perhaps two or three RN IIs at each meeting

On January 1, 2007, Engeldinger sent the following memo to the RN IIs:

To: RCC RN II Staff (dist)
From: Gordon Engeldinger
Re: RN II Meeting Schedule
Date: 1-1-07

On Tuesday, January 9th we will be having a mandatory RN II meeting at 1400 for the purpose of discussing our meeting schedule/requirements for the remainder of 2007.

RN II meeting participation was extremely poor in 2005 and 2006. It makes absolutely no sense to waste the time of 2 or 3 people when the rest don't show up, especially when most of the issues have to do with another unit/shift, or some general situation we need to reach a consensus on.

Please note that it is a requirement for us to have some meeting schedule. In the past, I have alternately suggested meeting every 2 months, or even quarterly, if the group felt it was too much of an imposition to meet monthly. Consistently, the group has recommended (and I agree) that meetings should be monthly.

On January 9th we will revisit the meeting schedule and determine a set schedule with parameters. I will publish the dates for the remainder of the year based on what we decide on the 9th.

Once again, this meeting is **mandatory**, with no excuses other than a physician's note or proof of a bona fide emergency accepted.

Please contact me if you have any questions.

Dist:

Teayl Johnson
Jean St. Louis
Steve Pauloski
Michelle Griffin
Shirley Williams
Sharon Martin

(emphasis in original)

All of the RN IIs, other than the Grievant, attended the January 9 meeting. Ms. Williams was at work on January 9. She did not provide a physician's note or proof of bona fide emergency to Mr. Engeldinger to explain why she did not attend the meeting. On January 10, Engeldinger sent the following memo to the RN IIs:

To: RCC RN II Staff (dist)
From: Gordon Engeldinger
Re: RN II 1-9-07 Meeting Follow Up
Date: 1-10-07

On Tuesday, January 9th a mandatory RN II meeting was conducted for the purpose of determining a meeting schedule and guidelines for the remainder of 2007. After discussing several alternatives, the following was determined and agreed upon by the majority:

1. RN II meetings will continue on a monthly basis per schedule distributed yesterday (time and location to remain the same)
2. AM/PM RN II's may miss up to 3 meetings for any reason (including vacation, sick, etc)
3. After the 3rd missed meeting, the employee will be subject to progressive discipline. Inasmuch as these meetings are mandatory, with the need and importance discussed yesterday, progressive discipline will begin at the level of a written Reprimand

4. 3rd shift RN II's, if desired, can work out a schedule of alternating participation. Due to their 3rd shift status, their minimum requirement is as follows:
Full time NOC RN II (Sharon Martin): 4
Part time NOC RN II (Tonna Howard): 2

In the event I am not available for the meeting, the meeting will be cancelled with no "penalty" to staff. Be sure to confirm my absence with myself, or Cyme Mathis, C7848.

Attached is a copy of the attendance log I will be keeping. You can use it to keep track of your own attendance. Please contact me if you have any questions.

Dist:

Teayl Johnson
Jean St. Louis
Steve Pauloski
Michele Griffin
Shirley Williams
Sharon Martin

Subsequent to this, Mr. Engeldinger met with Ms. Williams regarding her non-attendance on January 9. He then provided written documentation regarding her non-attendance at the mandatory meeting to Rodney Maybin, administrator of the Behavioral Health Division's long-term care facilities who also serves as a hearing officer in disciplinary cases. Mr. Maybin held a hearing on February 14th at which Ms. Williams and her union representatives were present and able to make a presentation regarding the charges against her. On February 16, 2007, Mr. Maybin issued a Notice of Suspension to Ms. Williams, stating that the reason for the suspension was violation of Civil Service Rule VII, Section 4(1):(k) Refusing or failing to obey orders of supervisor whether written or oral. Attached to the Notice of Suspension was Ms. Maybin's Summary of the meeting held on February 14, which reads as follows:

On February 14, 2007 a meeting to consider the imposition of discipline was held for employee Shirley Williams RNII. Those present were the employee Shirley Williams RNII, (FNHP) Federation of Nurse Health Professionals representatives Rita Marsh and Linda Fuderighe and myself Rodney Maybin, Rehab Centers Administrator acting as the meeting officer. The basis for the proposed discipline was for violations of Civil Service Rule VII Section 4 (1): (k) Refusing or failing to obey orders of supervisor whether written or oral & (m) Threatening, intimidating, coercing or harassing employees or supervision at any time.

During this meeting all parties agreed that Civil Service Rule (m) would be stricken without prejudice. A review of documentation submitted prior to this meeting by Nursing Program Coordinator Gordon Engeldinger consisted of a memorandum to the Rehab Centers Central Program Registered Nursing Staff, dated January 1, 2007, noting the importance of an upcoming mandatory meeting. Additionally submitted was a narrative of a January 12, 2007 conversation, between Shirley Williams and Mr. Engeldinger noting comments he perceived to be threatening, intimidating and harassing to him as a supervisor. Mrs. Williams indicates that in no way did she make reference to her dislike of Mr. Engeldinger or has she had conversations with him in loud and disruptive manners.

It is this hearing officer's belief that the documentation submitted by Mr. Engeldinger is accurate and a basis to find Mrs. Williams to be in violation of the above Civil Service Rule. A one-day suspension will be imposed. Ms. Williams had ample notification via the memorandum sent January 1, 2007 and sufficient opportunity to request an excuse when unable to attend.

At hearing, Mr. Maybin testified that his decision to impose a one-day suspension was based upon all the evidence as presented by both Mr. Engeldinger and Ms. Williams and her representatives plus a file review from which he had noticed that there had been other disciplinary findings in her personnel file which influenced his decision to impose a one-day suspension rather than a lesser level of discipline. Mr. Maybin also stated that the memorandum attached to the Notice of Suspension was a complete recounting of evidence presented at the disciplinary hearing.

At the arbitration hearing, Ms. Williams testified that she did not receive the January 1 memo in her mailbox until after the January 9 meeting had taken place, in fact not until January 12. Ms. Williams acknowledged that she was aware of the January 9 meeting on January 9 because the Unit Clerk brought it to her attention that morning. However, Ms. Williams was unaware of the mandatory nature of the meeting and thought that it was another meeting of the type held in 2005 and 2006 at which she was often one of only two or three RN IIs that attended. In 2006, Ms. Williams had specifically requested that the social worker who scheduled patient staffings for which she had responsibility to prepare MDS reports not be held on the days that the RN II meetings took place.

Ms. Williams further testified that she had two staffings on January 9, one at 10 a.m. that would not have affected her attendance at the RN II meeting, and one at 1:30 p.m. that lasted until approximately 2:30 p.m, after which she had responsibilities to complete prior to shift change including passing medications and charting.

It was Ms. Williams' testimony that as soon as she became aware of the conflict between her scheduled staffing and the RN II meeting, she attempted to contact Mr. Engeldinger. She did this by trying to call him on his phone and paging him. She stated that she left a voice mail message for him in which she indicated that she would not be in attendance.

Mr. Engeldinger testified that participation in patient staffing might be a valid reason for failing to attend the RN II meeting. He also testified that Ms. Williams did not communicate with him on January 9 regarding the staffings that she had scheduled for that day.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

1.05 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is . . . the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action . . .

5.01 DISCIPLINARY SUSPENSIONS

(1) In cases where an employee is suspended for a period of 10 days or less by the employee's department head, pursuant to the provisions of sec. 63.10, Wis. Stats., the Federation shall have the right to refer such disciplinary suspension to the arbitrator who shall proceed in accordance with the provisions of Section 4.03(2)(a). . . .

5.02 REPRESENTATION AT DISCIPLINARY OR DISCHARGE HEARINGS/MEETINGS

. . .

(6) Discipline or discharge shall be administered in a manner consistent with Rule VII, Section IV, of the Rules of the Civil Service Commission.¹

POSITIONS OF THE PARTIES

The Employer views this as a straightforward case wherein the Grievant, Shirley Williams, was notified that the RN II meeting of January 9 was a mandatory meeting requiring the attendance of all RN IIs, including the Grievant, unless a physician's note or a bona fide emergency occurred. Ms. Williams, according to the County, was informed of the meeting by

¹ Although the rules of the Civil Service Commission were not entered into evidence at the hearing, the undersigned takes notice of the rules that provide for dismissal of the complaint in the event the charges are not proven, as well as the standard requiring the Commission to take action as it deems necessary and proper to remedy the effects of a violation, should one be found.

means of a memo dated January 1 and another staff member verbally informed her of the meeting, prior to its occurrence. Despite such notification, Ms. Williams did not attend the meeting. The County contends that Ms. Williams' statement that she attempted to contact Mr. Engeldinger to advise him of a conflict with a patient staffing was not presented at the administrative hearing before Mr. Maybin. Such an attempted contact, by telephoning, paging, or leaving a voice mail message was uncorroborated testimony. Inasmuch as neither Ms. Williams nor her Union contested the report issued by Mr. Maybin, there is no basis to find anything other than that Ms. Williams failed to attend a mandatory meeting. Accordingly, the determination of the appointing authority should be affirmed, the suspension should be sustained and the grievance denied and dismissed.

The Union argues that there was good cause for Ms. Williams to not be at the RN II meeting on January 9 inasmuch as she was at a previously scheduled staffing which included the guardian for the resident. Ms. Williams contends that she did not receive the January 1 memo stating that the meeting was mandatory until days after the meeting took place but that when she was notified by the Unit Clerk on the morning of January 9 that there was a RN II meeting that afternoon, she made numerous attempts to contact Mr. Engeldinger to advise him that she had a conflict and would not be in attendance at the meeting.

Ms. Williams, through exhibits and testimony, demonstrated that she made an effort in 2006 to ensure that staffings did not conflict with RN II meetings, and that she was in attendance at all such meetings except when she was on vacation. She was one of the two or three RN IIs that did attend such meetings on a regular basis in 2006. Ms. Williams also points out that, upon receipt of the schedule for the 2007 RN II meetings, she notified the social worker who schedules staffings to ensure that she did not have a conflict between such staffings and RN II meetings in 2007, after January 9.

The Federation points out that Mr. Engeldinger's January 10 memo, which describes future RN II meetings as being mandatory, also allows for three absences and calls for progressive discipline beginning at the level of a written reprimand in the event an RN II misses a fourth meeting. This, the Union argues, is inconsistent with the level of discipline assessed against Ms. Williams for missing the January 9 meeting. Mr. Engeldinger appears to confuse expectation of attendance with mandatory attendance, as he testified that he expected RN IIs to attend the meetings, which were mandatory. Additionally, there had been no discipline issued in the past for failure to attend these meetings, at which attendance was also expected.

Finally, the Union points out that Mr. Maybin who testified that he considered Ms. Williams' past disciplinary history in determining that a one-day suspension was appropriate, did not provide any supporting documentation of that alleged history.

The Union contends that there is no basis for which to impose discipline on Ms. Williams, asks that the grievance be sustained, the one-day suspension be reversed and expunged from Ms. Williams' record and that she be made whole for all pay and benefits lost as a result of the suspension.

DISCUSSION

The parties have stipulated that the issue to be determined is whether the Employer had just cause to issue a one-day suspension to the Grievant for her failure to attend the January 9, 2007 RN II meeting. The collective bargaining agreement between the parties does not define just cause. Accordingly, in the absence of agreement by the parties or argument by either party as to the standard to be utilized, the undersigned will utilize a two-prong analysis which requires the Employer to establish the existence of conduct by the Grievant in which it has a disciplinary interest and then to establish that the discipline imposed for the conduct reflects its disciplinary interest. However, as a threshold matter, it is axiomatic that due process is an element of just cause.² Due process includes appropriate notice to the employee of the Employer's requirements.

The essential facts of the case are uncontested: Gordon Engeldinger issued a memo to all RN IIs on January 1, 2007, advising them that there would be a meeting of RN IIs on January 9, 2007, commencing at 2:00 p.m., and that attendance at that meeting was mandatory. Grievant, Shirley Williams, did not attend the meeting. Less clear is whether, and when, Ms. Williams received notice of the meeting and its mandatory nature, and whether she had a valid basis for not attending the meeting.

Ms. Williams acknowledges that she had verbal notification of the meeting on the morning of January 9, at which time the Unit Clerk reminded her of the 2:00 p.m. meeting. The record is silent on the question of whether the oral notification included the fact that Mr. Engeldinger had pronounced that attendance at the meeting was mandatory. Nonetheless, upon receipt of the verbal notification, Ms. Williams testified that she tried to contact Mr. Engeldinger to advise him that she had a conflict with a patient staffing that was scheduled to begin at 1:30 p.m. and that she would not be in attendance at the meeting.

Because the Employer has the burden of proof to demonstrate that Ms. Williams was aware of the mandatory nature of the meeting and it has failed to demonstrate that the verbal notice of the meeting included the fact that attendance was mandatory, the undersigned must assume that the fact that attendance was mandatory was not conveyed to Ms. Williams by the Unit Clerk.

As to the written notice, Ms. Williams testified that she did not receive it, including the fact that attendance was mandatory, with no excuses other than a physician's note or proof of a bona fide emergency, until some time after her conversation with Mr. Engledinger on January 12 regarding her non-attendance. Mr. Engeldinger testified that Ms. Williams did not provide a physician's note to explain her absence, did not provide documentation of a bona fide emergency to explain her absence, and that Ms. Williams was at work on January 9. He also testified that she did not contact him directly, on the day of the meeting, about her attendance.

² See, generally, Brand, ed., Discipline and Discharge in Arbitration, 1998, pp. 35 - 45.

He did not testify as to whether she attempted to page him, or whether he received a voice mail message from her on January 9 regarding her inability to attend the meeting due to the conflict with the patient staffing. However, consistent with Ms. Williams' notification to the social worker in 2006 and again in 2007 when she knew the schedule of RN II meetings, to not schedule a staffing that she had to attend when an RN II meeting was being held, Ms. Williams avers that she attempted to contact Mr. Engeldinger to advise of her conflict after receiving the verbal notification

In this disciplinary matter, the Employer has the burden of proof to establish that Ms. Williams received notification of the mandatory nature of the meeting, that she did not attend the meeting, and that her reasons for non-attendance did not meet the standards set forth in the notification: physician's note or bona fide emergency. Here, the Employer has not sustained its burden to demonstrate that the Grievant was aware of the mandatory nature of the meeting, though it is clear that the Grievant was aware of the meeting. The Employer did establish that Mr. Engeldinger "sent out" a memo regarding the meeting. However, there was no testimony as to the nature of how Mr. Engeldinger sent out that memo, who typed the memo, or how it was distributed to the RN IIs listed on the distribution list. Because all RN IIs on the list, other than Ms. Williams attended the meeting, the County appears to argue that it gave Ms. Williams notice of the mandatory nature of the meeting. The Employer failed to establish that Ms. Williams received the written notice or that she was, in some other fashion, advised that attendance at the meeting was mandatory.

At hearing, the Federation went to great length to establish the nature of the staffing in which Ms. Williams was scheduled to participate, as well as the nature of the work that said staffing entailed. The Union produced evidence of the schedule of staffings for the day in question, and the fact that Ms. Williams was scheduled for a staffing at 10:30 a.m. and at 1:30 p.m. The County contends that none of this information was presented at the hearing in front of Mr. Maybin, and that his report of the hearing includes all of the information that was presented, and neither Ms. Williams nor the Federation had previously claimed that his report was inaccurate.

While in the first instance it is irrelevant that the information may not have been presented to Mr. Maybin inasmuch as the arbitration hearing is in effect a *de novo* hearing, the better practice would be to present such information to the hearing officer and, hopefully, thereby avoid the arbitration process altogether. The Union, contrary to Mr. Maybin, contends that the information was presented at the administrative hearing. In the instant case, Mr. Maybin's testimony that his report is a full and accurate account of the hearing cannot be sustained. At the arbitration hearing he testified that Ms. Williams' prior disciplinary record was an element in the determination that a one-day suspension was appropriate. This is not included in the report of the hearing. Although there is a paragraph regarding the dismissal of one claim against Ms. Williams that includes her response to the charge of threatening,

intimidating, coercing or harassing employees or supervisors at any time, there is nothing in Mr. Maybin's report, quoted in its entirety above, that indicates Ms. Williams raised any defense to the charge of violating a direct order of a supervisor.³

Because Ms. Williams never received the direct order to attend the meeting, her non-attendance cannot be the basis for finding that she refused or failed to follow an order of her supervisor.⁴

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD⁵

The grievance is sustained. The County did not have just cause to suspend the Grievant for one day.

The one-day suspension shall be reversed and expunged from Ms. Williams' record and she shall be made whole of all pay and benefits lost as a result of the suspension.

Dated at Madison, Wisconsin, this 8th day of October 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

³ Although the Summary of Meeting indicates that there were two (2) attachments to it, the Exhibit offered at hearing, Joint Exhibit 2, only includes one, Engeldinger's January 1, 2007 memo. The Summary refers to a narrative of a January 12, 2007 conversation between Shirley Williams and Mr. Engeldinger which Mr. Maybin describes as "noting comments he perceived to be threatening, intimidating and harassing to him as a supervisor. Inasmuch as the memo of January 12 is not attached, the Undersigned has no knowledge of **any** of the facts that were presented to Mr. Maybin by Mr. Engeldinger.

⁴ In addition, Mr. Engledinger testified that a conflict with a patient staffing may be a valid reason for not attending the RN II meeting.

⁵ The undersigned will retain jurisdiction over this matter for a period of 30 days following issuance of this award the for purpose of resolving issues of remedy.